# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 1 |
| Statutes and regulation involved | 2 |
| Statement | 2 |
| Argument | 4 |
| Conclusion | 7 |
| Appendix | 8 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Jackson* v. *State*, 316 P. 2d 213 | 2 |
| *Reid* v. *United States*, 161 F. 469 (S.D.N.Y.), appeal dismissed, 211 U.S. 529 | 6 |
| Statutes and Regulations: | |
| 10 U.S.C. 1552 | 2, 7, 8 |
| 10 U.S.C. 8811 | 2, 6, 7, 8 |
| Air Force Regulation 39–22, dated September 23, 1953 | 2, 4, 5, 8–9 |
| Air Force Regulation 39–22, dated April 14, 1959 | 5, 9–10 |




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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 237 Misc.

WILLIAM JACKSON, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR CERTIORARI

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### OPINION BELOW

The opinion of the Court of Claims is reported at 297 F. 2d 939.

### JURISDICTION

The judgment of the Court of Claims was entered on January 12, 1962. A timely petition for rehearing was denied April 4, 1962. The petition for a writ of certiorari was filed on July 3, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

### QUESTION PRESENTED

Whether, as applied to the circumstances of his case, Air Force Regulation 39–22 violated petitioner's constitutional or statutory rights.

## STATUTES AND REGULATION INVOLVED

10 U.S.C. 8811, 1552, and Air Force Regulation 39–22 are set forth in the Appendix, *infra*, pp. 8–10.

## STATEMENT

On November 16, 1956, while serving in the Air Force, petitioner was convicted on a plea of guilty in the District Court of Jackson County, Oklahoma, of the crime of rape in the second degree. He was sentenced to serve a term of five years confinement in the state penitentiary (R. 1, 7).

On November 24, 1956, petitioner was discharged from the Air Force under other than honorable conditions pursuant to Air Force Regulation 39–22, dated September 23, 1953, *infra*, pp. 8–9. Thereafter, on December 22, 1956, petitioner filed a motion in the State district court to vacate the judgment of conviction. This motion was denied on January 8, 1957 and on January 9, 1957, petitioner appealed to the Oklahoma Court of Criminal Appeals (R. 2, 7). On September 20, 1957, more than eleven months after his conviction, the Court of Criminal Appeals vacated the judgment on the ground that petitioner had been denied his right to counsel, and remanded the cause to the district court for a new trial. *Jackson* v. *State*, 316 P. 2d 213. On May 6, 1958, on remand, the proceedings were dismissed at the County Attorney's instance (R. 2, 7–8).

By letter dated June 4, 1958, petitioner, through his attorney, advised the Air Force for the first time of his appeal and of the reversal of his conviction (R. 8). He then filed an application with the Air

Force Discharge Review Board for revocation of his undesirable discharge and reinstatement in the Air Force, basing his claim on the decision of the Court of Criminal Appeals and the subsequent dismissal of the criminal case (Pl. Ex. 1, Tab A). This application was subsequently abandoned, however, and petitioner applied to the Air Force Board for the Correction of Military Records for the same relief and, additionally, back pay (Pl. Ex. 1, Tab C). A hearing was held by the Board on September 16, 1959, and, on April 28, 1960, petitioner's application was denied (Pl. Ex. 1, Tab E). The Correction Board was of the view that, whatever the merits of petitioner's case may have been, they had been dissipated by his failure to be completely truthful and straightforward in his testimony before the Board. This decision was approved by the Secretary of the Air Force on the same date (Pl. Ex. 1, Tab F).

Thereafter, petitioner brought this suit in the Court of Claims to recover pay and allowances from the date of his discharge, alleging that he was unlawfully discharged from the United States Air Force, and that, in any event, the action of the Secretary of the Air Force denying his application for reinstatement and back pay was arbitrary and capricious (Pet. 5).

The Court of Claims held that Air Force Regulation 39–22, under which petitioner was discharged, was not arbitrary or unreasonable, but provided a safeguard whereby the Air Force could protect itself against continuing an airman in service when the circumstances warranted his removal. The court also

rejected petitioner's contention that the decision of the Correction Board and the approval by the Secretary of the Air Force were arbitrary and capricious. It held that, in denying petitioner's application, the Secretary was acting pursuant to his statutory authority to correct an error or to remove an injustice, that this is a discretionary function, and that the discretion had not been abused in the premises.

## ARGUMENT

Following the filing of the petition for a writ of certiorari, and at the instance of the Solicitor General who deemed it might be required by law, the Secretary of the Air Force has authorized the correction of petitioner's discharge, so as to reflect that it was an honorable discharge. Petitioner's counsel has been advised that, upon application, petitioner will be granted an honorable discharge certificate in lieu of the undesirable discharge which he originally received.

In the circumstances, the sole question is whether, upon the reversal of his conviction, petitioner had a constitutional or statutory right to more than the removal of the stigma attaching to the original discharge; *i.e.*, to be restored to the active rolls of the Air Force with back pay. We submit that, as the court below concluded, the answer is clearly in the negative, and that there is therefore no occasion for further review by this Court.

1. As previously noted, petitioner's discharge was effectuated under the authority of Air Force Regulation 39–22, *infra*, pp. 8–9, following his conviction in a state court of the crime of rape. That regulation reflected

a policy of immediately discharging a serviceman upon his conviction in a civil court of an offense punishable by imprisonment for more than one year.

We submit there can be no serious question respecting the right of the military establishments to take such action in the interest of the efficiency of the service. When a person is convicted of a felony "a garb of guilt" immediately attaches and this presumption is not removed by the taking of an appeal. It is certainly a reasonable judgment on the part of the military authorities that the retention on the rolls of a serviceman convicted of a serious crime will impair morale and discipline. Moreover, in many instances (as here), the conviction is followed by immediate incarceration by the civil authorities with the consequence that the serviceman is, as a practical matter, disabled from performing his military duties.[1]

2. Petitioner's principal attack upon Air Force Regulation 39–22 is directed to the absence of any provision for automatic reinstatement of the serviceman to the active rolls in the event that his convic-

[1] Air Force regulation 39–22 was superseded on April 14, 1959, by a new regulation, *infra*, pp. 9–10, which establishes a general policy of suspending the execution of an approved discharge based upon a conviction by a civil court pending the outcome of an appeal from the conviction. To be sure, the regulation in its present form provides that if the conviction is set aside, the discharge will not be carried out. We do not think that it can be seriously asserted, however, that the decision to separate a serviceman immediately following his conviction is unreasonable, especially when (as here) the circumstances provide good reason to doubt that he is morally suitable. Indeed, even now, Air Force Regulation 39–22 permits the immediate discharge of the serviceman in "appropriate cases" even though an appeal has been filed.

tion is set aside. However, petitioner's implicit assumption that a serviceman has a constitutional or statutory entitlement to this relief has no foundation.

It has never been suggested, to our knowledge, that the Constitution imposes an obligation upon the armed services to retain a serviceman until the expiration of his enlistment. The contract of a soldier of the United States, made by his enlistment and oath to serve for a definite term, is one terminable by the Government at will acting through an officer having proper authority. *Reid* v. *United States*, 161 Fed. 469 (S.D.N.Y.), appeal dismissed, 211 U.S. 529. "[T]his historical view of the soldier's relation to the * * * [state] antedates the founding of [our] nation and is the accepted doctrine of the British military establishment upon which ours was founded." *Ibid.*

Nor is there a basis for contending that the Secretary of the Air Force was under a statutory mandate to permit petitioner to serve the balance of his enlistment following the reversal of his conviction. 10 U.S.C. 8811 expressly authorizes the discharge of an enlisted member of the Air Force "as prescribed by the Secretary of the Air Force." Thus, Congress has left it to the Secretary to decide whether a particular serviceman should be permitted to complete his enlistment.

Air Force Regulation 39–22 does not purport to establish a rigid rule applicable to all servicemen in petitioner's circumstances. On the contrary, the regulation leaves open the question whether, upon the reversal of a conviction, the serviceman is to receive a certificate of honorable discharge or is to be reinstated for the duration of his enlistment term. It is

neither arbitrary nor unreasonable to commit this determination to the exercise of the Secretary's discretion on a case-to-case basis.

As is implicitly recognized in 10 U.S.C. 8811, the Secretary must have wide latitude in deciding whether to remove from the rolls servicemen who (even though not guilty of punishable conduct) detract from the efficiency of the service. The same, if not greater, latitude is indicated where the question is one of restoring to the active rolls a man whose connection with the service has already been interrupted.[2]

In sum, the most that petitioner was entitled to as a matter of right was to have the stigma on his military record removed when, because of the reversal of his conviction, there was no longer a basis for a punitive discharge. As already noted, he will be issued an honorable discharge upon application.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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*Solicitor General.*

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OCTOBER 1962.

[2] Perhaps the Secretary, under his authority to "remove an injustice," 10 U.S.C. 1552, should have corrected petitioner's discharge to reflect that it was an honorable one. But no such relief was requested of him or the Correction Board. In any event, that issue is now mooted.

## APPENDIX

1. 10 U.S.C. 8811 provides:

> **Air Force enlisted members: discharge certificate; limitations on discharge**
>
> (a) A discharge certificate shall be given to each lawfully inducted or enlisted member of the Air Force upon his discharge.
>
> (b) No enlisted member of the Air Force may be discharged before his term of service expires, except—
>
> (1) as prescribed by the Secretary of the Air Force;
>
> (2) by sentence of a general or special court-martial; or
>
> (3) as otherwise provided by law.

2. 10 U.S.C. 1552 in pertinent part provides:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

3. Air Force Regulation 39–22, dated September 23, 1953 in pertinent part provides:

> 5. **Upon Conviction of Offenses Punishable by Death or Imprisonment for More than One Year.** Except as provided in b below, the gen-

eral policy will be to discharge an airman with an undesirable discharge under this Regulation where the airman has been convicted by civil court of an offense punishable by death or imprisonment for more than 1 year. * * *

* * * * *

15. **Miscellaneous.** * * *

a. The option of discharging an airman under paragraph 5 of this Regulation, due to conviction by civil court, is not a continuous one. For example, where fact of conviction is known to Air Force authorities upon return to military control of an airman subject to discharge under this Regulation, immediate action should be taken to effect discharge or waiver. If the required action is not taken and the airman is continued in the service, although fact of the conviction is known, such continuation in the service may be construed as a constructive waiver. After such automatic waiver, no action may be taken at an unreasonably later date to process airman for discharge due to conviction by civil court.

4. Air Force Regulation 39–22, dated April 14, 1959, in pertinent part provides:

2. **The Conditions Which Subject an Airman to Discharge.** An airman is subject to discharge for misconduct under this regulation upon conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of one year; or which involves moral turpitude * * *

* * * * *

11. **Appeals of Airmen to Civil Court Disposition.** An airman subject to discharge under this Regulation may be processed for discharge or waiver even though he has filed an appeal to the civil court action in his case or has stated his intention of doing so. However,

it will be the general policy to withhold the execution of an approved discharge pending outcome of the appeal. In the event the appeal results in the conviction being set aside the airman will not be discharged under this Regulation, although he may be considered for discharge under other regulations, if appropriate, as outlined in paragraph 12. In the event the execution of a discharge under this Regulation is considered appropriate, without awaiting outcome of an appeal, the case will be referred to the Director of Military Personnel, Headquarters, USAF, for a decision.

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